

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

<p>STATE OF OKLAHOMA, <i>et al.</i>,</p> <p style="text-align: center;">Plaintiffs</p> <p>vs.</p> <p>TYSON FOODS, INC., <i>et al.</i></p> <p style="text-align: center;">Defendants</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>Case No. 4:05-cv-00329-GKF-PJC</p>
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**DEFENDANTS’ OBJECTION AND RESPONSE TO PLAINTIFFS’
MOTION *IN LIMINE* PERTAINING TO ANY ALLEGED
ADVERSE IMPACT WHICH MAY RESULT IF THE RELIEF
SOUGHT BY THE STATE IS GRANTED (Dkt. 2427)**

Defendants respectfully object to the Plaintiffs’ Motion *In Limine* Pertaining To Any Alleged Adverse Impact Which May Result If The Relief Sought By The State Is Granted (Dkt. 2427) and offer the following for their response.

INTRODUCTION

Plaintiffs’ motion should be denied because it seeks to prevent the introduction of evidence and argument regarding the adverse impact of the relief it seeks which is relevant in an injunctive case. The Tenth Circuit Court of Appeals in this very case has ruled that the traditional equitable factors, though modified, are to be used when considering injunctive relief. One of the specific factors mentioned is balancing the equities between the parties. *State of Oklahoma, ex rel. v. Tyson Foods, Inc., et al.* 565 F.3d 769, (10th Cir. 2009). The Tenth Circuit also held that a Court should consider

whether a requested injunction is in the public interest. Plainly, evidence of potential adverse impacts from injunctive relief are plainly relevant to both of these considerations.

ARGUMENT

Injunctions are equitable in nature. *See In re Otasco, Inc.*, 110 B.R. 964, 966 (Bankr. N.D. Okla. 1990). By their nature, injunctions are a balancing of evidence, law and policy that helps determine whether or not an injunction should issue. Here the Plaintiffs move *in limine* to keep out argument and evidence of the potential economic hardship their requested relief would impose on growers or how it might adversely affect the local economy.

The standard for a permanent injunction is the same as the standard for a preliminary injunction with the exception that a permanent injunction must be premised on a finding of actual success on the merits not a likelihood of success on the merits. *See Amoco Production Co. v. Gambell*, 480 U.S. 531, 546 n. 12, 94 L. Ed 2d 542, 107 S. S. Ct. 1396 (1987). As noted by the Tenth Circuit Court of Appeals, in the present case, those elements include, “(1) a likelihood of success on the merits [modified for a permanent injunction]; (2) a likelihood that the movant will suffer irreparable harm in the absence of ... relief; (3) that the balance of equities tips in the movant’s favor; and (4) that the injunction is in the public interest.” *State of Oklahoma, ex rel. v. Tyson Foods, Inc. et al.*, 565 F.3d 769, 776 (10th Cir. 2009). While other circuits may dispute the applicability of the balancing of equities in a case where the plaintiff is a State (or a private attorney general), *compare, Environmental Defense Fund, Inc. v. Lamphier*, 714 F.2d 331 (4th Circuit 1983), the Tenth Circuit has authoritatively announced the relevant

standard in this very case. The Court of Appeals statement is both the law of the case and precedential to this Court. Authorities from other circuits are persuasive at best.

Under the Federal Rules of Evidence, Rule 402, relevant evidence is generally admissible. Fed.R.Evid. 402. Relevant evidence is, “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.” Fed. R. Evid. 401.

Because the balancing of equities is necessary to the determination regarding the issuance of a permanent injunction, evidence addressing both the need for an injunction and the harm it will cause is relevant and should be admitted. In this regard, the Plaintiffs are narrowly selective in their approach to what is relevant. On one hand they claim to be representing the public (public health claims) but on the other hand, they wish to ignore how such an injunction might effect the very same public.

The Plaintiffs also argue that the balancing of the equities can only apply to the parties to the lawsuit. In this regard they are also applying inconsistent positions. For instance, they have not sued any growers, arguably an important link in the claim that chicken litter is being applied to fields in the Illinois River Watershed. The Plaintiffs first argue that the Defendants are culpable for the actions of the growers, but and then for purposes of their argument on this motion state, “[f]or the purpose of the hearing on the State’s Motion for Preliminary Injunction, the Court determined that the Defendants could present balancing of hardships evidence with respect to the Defendants and the poultry growers...the Court based this ruling on the fact that the State had alleged: (a) the growers are the agents of the Defendants; and (b) Defendants control these growers

through an oligopoly business practice. *Id.* However, because the growers are not “parties” to this litigation, the Court’s ruling should not be extended to the trial on the merits.” Plaintiffs’ Motion *In Limine* Pertaining to Any Alleged Adverse Impact Which May Result If the Relief Requested by the State Is Granted. (Dkt # 2427), footnote 2 (Cites to Preliminary Injunction Trial Record Omitted.)

Thus the Plaintiffs are attempting to have the growers be both closely enough related to the Defendants to impute liability but not closely related enough to be considered when it comes to a determination of the harm the injunction might cause. But in any event, even if we assume that the Plaintiffs are right, then the growers are simply part of the general public and in that capacity injury to growers and to the regional economy must be considered as part of determining whether an injunction is in the public interest.

There is no way in which the Plaintiffs can avoid evidence about the effect of a potential injunction. It is relevant under both the balancing of equities element and the public interest element of a claim for an injunction. The Court is entitled to receive evidence of what may result from what Plaintiffs are demanding.

Interestingly, the Plaintiffs cite no case which directly indicates that it is inappropriate for the effect of the relief being requested to be considered by a jury. The one case cited by the Plaintiffs for this proposition, *Computer Associates Int’l v. American Fundware, Inc.*, 831 F. Supp. 1516 (D.Colo. 1993), involved breach of contract and unfair competition claim based upon the alleged misappropriation of software code. The Court in that case noted that the defendant gave three reasons why the financial

condition of the parties was relevant. First, it claimed it was relevant to determine damages in the unfair competition claim. The Court rejected that argument because the Court eliminated the unfair competition claim by granting summary judgment to the Plaintiff in the case. The defendant also argued that the financial condition was important because of the punitive damage aspect of the claim. The Court rejected that argument due to a recently enacted Colorado statute that precluded such evidence from a punitive damages consideration. The third claim was that it was necessary because of the effect it might have on the defendant. The Court rejected that argument as injunctive relief was within the Court's purview. However, the Court noted that other cases suggested that the relative hardship of an injunction on the defendant in a misappropriation case was to be considered. "*Nelson v. National Fund Raising Consultants, Inc.*, 64 Wash. App. 184, 823 P.2d 1165, 1169 (Wash. App.) (factors relevant to permanent injunction for trade secret misappropriation include the relative hardship likely to result to the defendant if injunction is granted), *aff'd* in relevant part, 842 P.2d 473 (Wash. 1992) with *Rockwell Graphic Sys., Inc. v. DEV Indus., Inc.*, No. 84 C 6746, 1993 WL 286484 at *6 (N.D. Ill. July 29, 1993) (result that defendant might be put out of business if injunction issued would be due to defendant's unlawful actions, not the court's legitimate exercise of its discretion in awarding equitable relief)." *Computer Assocs. Int'l v American Fundware*, 831 F. Supp. 1516, 1528 (D. Colo. 1993).

A strong argument can be made that the *Computer Associates* case has very limited precedential value as it is a misappropriations case and the Court had other stronger reasons for keeping out financial data of companies involved. Additionally and

more importantly, it did not address the argument the Plaintiffs are putting forth in this case, that evidence or argument as to the effect of the particular relief being granted should be excluded. It is a long stretch to get a case regarding software plagiarism and the parties' financial data to apply to argument or evidence regarding economic hardship to third parties or the community in this case and Defendants' respectfully suggest the gap is too large to span.

CONCLUSION

Because the impact of any relief that Plaintiffs may seek is plainly relevant to the Court's evaluation of the need for and appropriateness of a permanent injunction, Plaintiffs' Motion *In Limine* Pertaining To Any Alleged Adverse Impact Which May Result If the Relief Sought By The State Is Granted (DKT # 2427) should be denied.

Respectfully submitted,

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I certify that on the 20th day of August 2009, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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